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Constitutional Law--Involuntary Confessions--False Representation in Obtaining Confession Held Violation of Due Process (Spano v. New York, 360 U.S. 315 (1959))

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CONSTITUTIONAL LAW — INVOLUNTARY CONFESSIONS — FALSE REPRESENTATION IN OBTAINING CONFESSION HELD VIOLATION OF DUE PROCESS.—Following an indictment for first degree murder, defendant telephoned his close friend, a patrolman, and admitted the crime. Surrendering the following day, defendant was questioned for eight hours without counsel despite repeated requests to see his attorney, and ultimately confessed on the false representation that the phone call had jeopardized his friend's position. The United States Supreme Court in reversing the New York Court of Appeals [1] *held* the use of such confession violated the "traditional principles" of due process. *Spano v. New York,* 360 U.S. 315 (1959).

Prior to the adoption of the fourteenth amendment, state criminal proceedings were comparatively unhampered by constitutional restraints.[2] The only constitutional limitations of any significance in these proceedings were those found in the first article relating to ex post facto laws and bills of attainder.[3] Subsequent to the adoption of the fourteenth amendment and up to the present day, states continue to regulate their own criminal procedure, for it is the "very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice." [4]

In 1936 irregular practices in state criminal proceedings led the United States Supreme Court to regulate the admissibility of allegedly coerced confessions.[5] In *Brown v. Mississippi,*[6] physical force employed in extracting confessions was held violative of due process. Such means can never be used to obtain evidence to convict a defendant.[7]

In regard to the use of psychological force in obtaining confessions, the Supreme Court has stated various norms to determine at

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[1] People v. Spano, 4 N.Y.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1958).

[2] Gorfinkel, *The Fourteenth Amendment and State Criminal Proceedings—"Ordered Liberty" or "Just Deserts,"* 41 CALIF. L. REV. 672 (1953).

[3] "No State shall . . . pass any Bill of Attainder, ex post facto Law. . . ." U.S. CONST. art. I, § 10.

[4] Hoag v. New Jersey, 356 U.S. 464, 468 (1958). See Brown v. New Jersey, 175 U.S. 172 (1899), wherein states are free to regulate procedure in their own courts so long as they are not in conflict with due process and fundamental principles of liberty and justice.

[5] See 39 CORNELL L.Q. 321 (1954). At the same time, the Supreme Court has recognized a narrower control over state criminal cases than that which it possesses over the federal courts. Watts v. Indiana, 338 U.S. 49, 50 n.1 (1949).

[6] 297 U.S. 278 (1936).

[7] Brown v. Mississippi, 297 U.S. 278 (1936). See Chambers v. Florida, 309 U.S. 227 (1940); People v. Barbato, 254 N.Y. 170, 172 N.E. 458 (1930). In Ashcraft v. Tennessee, 322 U.S. 143, 160 (1944) (dissenting opinion), it was stated that American courts almost universally hold "that a confession obtained during or shortly after the confessor has been subjected to brutality, torture, beating, starvation, or physical pain of any kind is *prima facie* 'involuntary'." At the turn of the century, the test for the admissibility of a confession was its trustworthiness. Wilson v. United States, 162 U.S. 613 (1896). See also Comments, 27 FORDHAM L. REV. 396 (1958).

what point this method violates due process. The court is not bound by the finding of the jury as to the voluntariness of a confession. From the evidence introduced, it will make an independent finding on the undisputed facts.[8]

Following the decision in the *Brown* case the Supreme Court applied the test of "fairness," stating that "the aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[9] It is invoked to determine if a fair risk exists that the confession is false.[10] This criterion for due process has not been changed by subsequent norms and is found in recent decisions.[11]

In 1944 the United States Supreme Court handed down a new test in *Ashcraft v. Tennessee*.[12] The defendant was questioned for thirty-six hours by relays of officers and investigators. This method of questioning as shown by the uncontradicted evidence is "inherently coercive" and thus violates due process.[13] Its very existence comes in conflict with the full use of mental freedom,[14] which depends on whether the accused, at the time he confesses, has the use of his faculties to enable him freely to confess or deny participation in a crime.[15] However, the bare fact of police detention and examination in private does not render a confession so obtained involuntary.[16] What constitutes inherent coercion must depend on the circumstances of each case.[17]

The recent decisions of the Supreme Court have indicated an embodiment of past principles in a subjective test. In *Stein v. New York*,[18] the conviction was affirmed by the Supreme Court over petitioners' objection that psychological pressure in repeated interrogation was used to overpower their mental resistance and induced an involuntary confession.[19] The extent of psychological pressure in any

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[8] Chambers v. Florida, *supra* note 7; *accord,* Malinski v. New York, 324 U.S. 401 (1945).

[9] Lisenba v. California, 314 U.S. 219, 236 (1941); *accord,* Lyons v. Oklahoma, 322 U.S. 596 (1944).

[10] Lisenba v. California, *supra* note 9, at 236. See 3 WIGMORE, EVIDENCE §§ 823-24 (3d ed. 1940).

[11] Stroble v. California, 343 U.S. 181 (1952); United States v. Claudy, 204 F.2d 624 (3d Cir. 1953); Palakiko v. Hawaii, 188 F.2d 54 (9th Cir. 1951).

[12] 322 U.S. 143 (1944).

[13] *Id.* at 154.

[14] *Ibid.*

[15] Lyons v. Oklahoma, 322 U.S. 596 (1944).

[16] Crooker v. California, 357 U.S. 433 (1958). See Balbo v. People, 80 N.Y. 484 (1880) (denying involuntariness of a confession made during illegal arrest).

[17] See notes 24-27 *infra.*

[18] 346 U.S. 156 (1953).

[19] *Id.* at 184. See 39 CORNELL L.Q. 321 (1954), wherein it was stated that as a result of the *Stein* opinion, there would be a narrower interpretation of the due process clause, the according of great weight to the determination of the jury and a return to the trustworthy theory.

case must depend upon a "weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." [20]

In *Fikes v. Alabama*,[21] petitioner, an uneducated Negro, was taken to a state prison far from home, held incommunicado for one week and given neither preliminary hearing nor the right to consult counsel. The Supreme Court reversed the state conviction using the same test as was expounded in affirming the *Stein* conviction.

The *Payne v. Arkansas* [22] decision of 1958 encompassed prior norms and tests in applying the "totality" theory. Petitioner, a mentally dull youth, was denied a hearing, held incommunicado for three days and denied food for a long period of time. In addition, he was threatened with mob violence, after which he confessed. The Supreme Court held: "it seems obvious from the *totality* of this course of conduct . . . that the confession was coerced and did not constitute an *'expression of free choice,'* and that its use before the jury . . . deprived him of *'that fundamental fairness* essential to the very concept of justice' . . . ." [23]

The norms supply only a workable theory. The defendant's educational background,[24] literacy,[25] and age,[26] along with incessant interrogation,[27] are the most important factors in the application of the theory.

In the *Spano* opinion the state was attempting to obtain a confession in a different setting. The state was not merely attempting to solve the crime or to gather evidence upon which to indict, as in the cases outlined above, but rather, a grand jury had already found sufficient cause to return an indictment against Spano. The police were trying to procure additional information upon which to convict him.

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[20] Stein v. New York, *supra* note 18, at 185. See Gorfinkel, *The Fourteenth Amendment and State Criminal Proceedings—"Ordered Liberty" or "Just Deserts,"* 41 CALIF. L. REV. 672 (1953). The test of due process is not whether proceedings were consistent with fundamental guarantees but whether defendant got what he deserved.

[21] 352 U.S. 191 (1957).

[22] 356 U.S. 560 (1958).

[23] *Id.* at 567. (Emphasis added.) A confession by which life is taken must be an expression of free choice. Watts v. Indiana, 338 U.S. 49, 53 (1949).

[24] Crooker v. California, 357 U.S. 433 (1958) (involving a law student); Ward v. Texas, 316 U.S. 547 (1942) (concerning an ignorant Negro); Payne v. Arkansas, 356 U.S. 560 (1958).

[25] Harris v. South Carolina, 338 U.S. 68 (1949); White v. Texas, 310 U.S. 530 (1940) (concerns confessions of an illiterate farmhand). *But see* Gallegos v. Nebraska, 342 U.S. 55 (1951) (dictum), where a confession may be voluntary notwithstanding accused's illiteracy.

[26] Haley v. Ohio, 332 U.S. 596 (1948); Chambers v. Florida, 309 U.S. 227 (1940).

[27] Harris v. South Carolina, *supra* note 25; Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, *supra* note 26.

Does deception render a confession involuntary?[28] New York cases do not exclude confessions if procured by deceptive means provided they were voluntarily made.[29] The fact that deception was employed is not sufficient to justify withholding a confession from the jury's consideration, and the confession may be the basis of a guilty verdict if not subject to other objections.[30] The question is whether petitioner was induced to utter a falsehood or "felt compelled to speak for any reason when he preferred to remain silent."[31]

In a circuit court case,[32] defendant was held incommunicado for forty hours and confronted by three people who were actually detectives falsely pretending to identify him as the person engaged in the crime. The confession was not admitted as evidence of his guilt because of other factors, but the court maintained the New York rule as a general principle. Alone or together neither the prolonged detention nor the perpetrated deception was sufficient to nullify a confession as unconstitutionally procured. These are relevant factors in undermining the due process concept.[33]

The method used in obtaining the confession was an issue in *Leyra v. Denno*.[34] A psychiatrist as a paid representative of New York State was falsely presented as a doctor, and by persistent, skillful and suggestive questioning inducing a trance-like state, a confession was obtained. The state was using the "doctor"-patient relationship as a continuation of the police effort to induce petitioner to confess. The extracting of a confession *in such a manner* is more than deception and therefore not consistent with due process.[35]

Various state courts have decided that deception alone cannot be a basis for inadmissibility.[36] As in coerced confessions, the confes-

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[28] The *Spano* opinion was based largely on the deception perpetrated on the defendant. See N.Y. CODE CRIM. PROC. § 395: "A confession of a defendant, whether in the course of judicial proceeding or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

[29] People v. White, 176 N.Y. 331, 68 N.E. 630 (1903). Here there was a pretense of being accused's friend. *Accord,* People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951). See People v. Wentz, 37 N.Y. 303 (1867) (dictum).

[30] People v. Buffom, 214 N.Y. 53, 108 N.E. 184 (1915).

[31] People v. White, *supra* note 29, at 349, 68 N.E. at 636. New York procedure for excluding coerced confessions relies heavily on the jury. There is a preliminary hearing whereby the judge must exclude any confession that he deems to be involuntary. If he finds an issue of voluntariness, and presents a question of fact, he must receive the confession and submit it to the jury with proper instructions as to its voluntary character. Stein v. New York, 346 U.S. 156, 172 (1953); People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909).

[32] United States *ex rel.* Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955).

[33] *Id.* at 700-01. See also Lewis v. United States, 74 F.2d 173 (9th Cir. 1934).

[34] 347 U.S. 556 (1954).

[35] *Ibid.* See generally N.Y. CIV. PRAC. ACT § 352 which prohibits the disclosure by a physician of professional knowledge.

[36] State v. Hofer, 238 Iowa 820, 28 N.W.2d 475 (1947); Commonwealth v.

sion through deception relates to method and circumstance. Was there such an inducement to the defendant that the confession may be involuntary? [37]

Spano, an uneducated, foreign born citizen, faced massive official interrogation for eight hours culminating in the deception. His patrolman friend played the part of a worried father, harried by his superiors; this barrage was conducted in four relays, the last one extending for one hour. After considering all the facts in their *post-indictment* setting the Court concluded that petitioner's will was overborn by official pressure, fatigue and sympathy falsely aroused.[38]

The concurring opinions in *Spano v. New York* were based on the defendant's right to counsel. The due process clause of the fourteenth amendment does not contain the specific guarantees that are given to citizens in federal prosecutions by the sixth amendment.[39] The clause constitutes a less rigid and more fluid concept than that contained in the Bill of Rights.[40] But the Supreme Court has held that the right to counsel is not to be limited to the period of the trial itself.[41] Two recent decisions by this Court [42] have limited the concept. The defendants are not entitled to counsel at every stage of the pre-trial proceeding. Such a doctrine would render criminal enforcement difficult in precluding police questioning without counsel.[43]

Green, 302 Mass. 547, 20 N.E.2d 417 (1939). *But see* Macon v. Commonwealth, 187 Va. 363, 46 S.E.2d 396 (1948) (dictum). For decisions in various states, see 3 WIGMORE, EVIDENCE § 841 n.1 (3d ed. 1940).

[37] See People v. White, 176 N.Y. 331, 68 N.E. 630 (1903). If a coerced confession was admitted, will the judgment be set aside even though there is other evidence apart from the confession? Malinski v. New York, 324 U.S. 401 (1945), answered this in the affirmative although in Stein v. New York, 346 U.S. 156, 188 (1953), it appeared that the opposite conclusion was reached. This, however, was dictum since the *Stein* opinion held the confession to be voluntary.

The *Spano* opinion, discussing this point, stated that "Stein held only that when a confession is not found by *this* Court to be involuntary, this Court will not reverse on the ground that the jury might have found it involuntary and might have relied on it." Spano v. New York, 360 U.S. 315, 324 (1959). (Emphasis added.)

[38] Spano v. New York, 360 U.S. 315, 323 (1959). (Emphasis added.)

[39] Betts v. Brady, 316 U.S. 455 (1942). FED. R. CRIM. P. 44 provides: "[I]f the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

[40] Betts v. Brady, 316 U.S. 455, 462 (1942).

[41] Powell v. Alabama, 287 U.S. 45 (1932); *accord,* People *ex rel.* Burgess v. Risley, 66 How. Pr. 67 (1883). The petitioner was not indicted at the time when he requested right to counsel; held, everyone accused of or arrested for a crime is entitled to counsel during the entire stage of the proceeding. Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920).

[42] Cicenia v. Lagay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958).

[43] N.Y. CODE CRIM. PROC. § 308 provides that if the defendant appear for arraignment without counsel, he must be asked if he desires the aid of counsel, and if he does the court must assign counsel.

In both cases during the questioning the defendants had not been indicted and were considered suspects rather than defendants. Refusing counsel in the pre-trial stage violates due process only if the accused is so prejudiced thereby that his subsequent trial would lack basic fairness.[44] The circumstances of each particular case must be considered.[45]

The majority in the *Spano* opinion advanced a new test to be applied in determining the admissibility of confessions. The courts must now examine whether the confession obtained is in accord with the "traditional principles" of due process. There is no criterion or definition given by the Supreme Court, but on the basis of this study of the recent trend of decisions, the "traditional principle" test appears to be an embodiment of the "fundamental fairness" and "inherently coercive" tests as well as the "totality" norm. It is the first time the Court has so vigorously denounced the use of deceptive practices in extracting confessions and emphasized that the events surrounding the confession took place after a grand jury had found cause to indict him. The result is to be commended. However, it is also possible that the decision might result in an interference with state criminal enforcement if it were construed to mean that no police questioning at all could occur in the absence of counsel. Perhaps the concurring opinion of Mr. Justice Douglas sets a good norm. He states that once Spano had been indicted for a capital crime and was no longer a mere suspect, he was at that point entitled to counsel under the provisions of the fourteenth amendment.

DEFAMATION — BROADCASTER'S LIABILITY — § 315 OF FEDERAL COMMUNICATIONS ACT IMPLIES COMPLETE IMMUNITY. — On the basis of a statement made by a political candidate during a campaign broadcast, defendant-broadcaster was sued for libel. The trial court dismissed the complaint on the ground that Section 315 of the Federal Communications Act[1] rendered the station immune from liability. The Supreme Court of North Dakota affirmed. On appeal to the United States Supreme Court, *held,* since section 315 prohibits the broadcaster from censoring political broadcasts, the privilege of immunity from liability "must follow as a corollary." *Farmers Educ. and Co-op. Union v. WDAY, Inc.,* 360 U.S. 525 (1959).

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[44] Crooker v. California, *supra* note 42, at 439; see Lisenba v. California, 314 U.S. 219 (1941) (dictum).

[45] See, *e.g.,* Crooker v. California, *supra* note 42, at 440; House v. Mayo, 324 U.S. 42 (1945).

[1] 48 Stat. 1088 (1934) (amended by 66 Stat. 717 (1952), as amended, 47 U.S.C. § 315 (1952)).